90-1403

Supreme Court, U.S.
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No. 91-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1991

LEONARD F. THOMAS
Petitioner,

vs.

J. CORT HARRINGTON, JR.,
MARK A. ERLER,
NANCY J. THOMAS
Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE MONTANA SUPREME COURT

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QUESTIONS PRESENTED

1. Does the application of the doctrine of collateral estoppel; barring Petitioner from litigating the factual issues of malice, improper purpose, and probable cause in a malicious prosecution and abuse of process action; based upon a District Court decision that sanctions pursuant to Rule 11, M.R.Civ.P. were not appropriate and a Montana Supreme Court opinion affirming that decision; violate Petitioner's right of due process as guaranteed by the 14th Amendment to the Constitution of the United States; where no evidentiary hearing was held on the issues of intent or motive and no findings of fact or conclusions of law were entered by the District Court in the prior proceeding?

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CONSTITUTION

Section 1, 14th Amendment to Constitution of the United States . . 2

The Petitioner, Leonard F. Thomas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Montana Supreme Court entered in this proceeding on January 15, 1991.

OPINIONS BELOW

The unreported opinion of the Montana Supreme Court is reproduced in Appendix A.

JURISDICTION

The judgment of the Montana Supreme Court was entered on January 15, 1991. This petition for writ of certiorari is filed within 90 days of the date of entry of judgment. The jurisdiction of this court is invoked under the provisions of 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS

Section 1 of the 14th Amendment to the Constitution of the United States of America provides:

> Section 1. Citizens of the United States All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unite States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Leonard F. Thomas, and Respondent, Nancy J. Thomas, were married in Alaska where, on October 16, 1978, Robin Diana Thomas was born; the issue of the marriage. Leonard and Nancy moved to Montana where, in the Fall of 1979, they separated. Prior to returning to Alaska,

Leonard visited with Robin in Basin, Montana where Robin and Nancy were living with Respondent, Mark A. Erler. In 1983, a decree of dissolution of Leonard and Nancy's marriage; providing for custody to Nancy, visitation allowed upon request, and no child support requested; was entered with the Montana Fifth Judicial District Court in and for Jefferson County. Later that same year, Nancy and Mark were married. In February of 1988, a decree of dissolution of Mark and Nancy's marriage; providing for Mark's joint custody of and extensive visitation rights with Robin; was entered with the Montana First Judicial District Court in and for Lewis and Clark County, Judge Thomas C. Honzel presiding. Respondent, J. Cort Harrington, Jr. represented Mark in the dissolution proceedings. Nancy was not represented by counsel.

In August of 1988, Leonard visited with Robin in the Helena area. This was Leonard's first contact with Robin since a visit by Nancy and Robin in Alaska during the Fall of 1980. Nancy was living with her boyfriend in the main house on Mark and Nancy's property in Rimini, Montana. Mark resided in another building on the their property.

Nancy informed Leonard that:

1. Mark was not allowed in her house because he had threatened to shoot her live-in boyfriend.
2. She wanted Mark to move away, but could not force him to move.
3. Mark had been verbally abusive to Robin.
4. She wanted to get her children away from Mark.
5. Robin needed another "male role model" and it should be Leonard.

6. She would not remarry, but would not live alone(without a man).

An argument between Leonard and Nancy resulted in Leonard being told to stay out of Nancy's house. After some difficulties, Nancy agreed to allow Leonard visitation during what otherwise would have been Robin's day care time. Robin enjoyed these visits; much of the time was spent teaching Robin(age 10) to swim.

Prior to the beginning of the school year, Leonard informed Nancy that he would begin helping out with Robin's support. He gave Nancy $60 to help pay for school supplies and contacted the State of Montana to arrange to make support payments. Leonard requested that Mark and Nancy each give up one weekend day each month and that Nancy allow Leonard a few hours after school one day each week for Leonard and Robin to visit. Nancy requested that

Leonard go back to Alaska and return in a couple of years. Leonard informed Nancy that he had made a commitment to Robin that he would stay and visit with her. Leonard questioned Mark as to why he was refusing to give up the one weekend day each month. Mark threatened to shoot Leonard(if he came on their property to see Robin) and stated that he would get an "injunction" against Leonard seeing Robin. When Nancy heard of Mark's threats she refused to allow Leonard any contact with Robin including telephone calls.

Nancy contacted Mr. Harrington for legal advice. Mr. Harrington later admitted that he advised Nancy, from the beginning, to refuse to allow Leonard's visitation requests and that he continued to advice her to refuse to allow the visitation. (Montana's criminal statute on visitation interference is reproduced in the Appendix

at page 70a). Later, Mark admitted that he instructed Mr. Harrington to proceed with the filing of an adoption petition against his advice that there had never been an adoption like it before. Mark also stated that he could not recall Mr. Harrington telling him that there could be an adoption. (Petition for Adoption, Appendix, page 37a)

After reading Montana's Uniform Adoption Act, Leonard contacted his attorney, Dennis Loveless, to inform him of the requirements that either Mark and Nancy remarry or Nancy relinquish her parental rights. Mr. Loveless contacted Mr. Harrington to discuss the provisions. Leonard contacted Mark; informing him of the requirements that he and Nancy remarry or that she relinquish her parental rights. Mark stated that Nancy would not relinquish her parental rights but that they might remarry. Leonard left a note for Nancy

informing her of the requirements. Leonard offered to pay one hours attorney's fees with an attorney of their choice for a second opinion.

For the convenience of the Court the relevant statutes are reproduced here and on page 34a of the Appendix.

Section 40-8-125(2), MCA:

> After a final decree of adoption is entered, the natural parents and the kindred of the natural parents of the adopted child, unless they are the adoptive parents or the spouse of an adoptive parent, shall be relieved of all parental responsibilities for said child and have no rights over such adopted child or to his property by descent and distribution.

The following week, Leonard's request to the Montana Fifth Judicial District Court for a specific visitation schedule came to a hearing. During pre-hearing negotiations, Leonard was willing to agree to limit his contact to supervised visits in a counselor's office until as such time as

that counselor was ready to make a visitation recommendation. No counter proposal was made. After Leonard and Nancy testified, Mr. Harrington informed the court that there was a proceeding to "terminate his right of visitation". The court reserved a visitation order pending resolution of the adoption proceedings.

On November 9, 1988, Leonard, through his attorney, filed a motion to dismiss the adoption proceedings; arguing that, because Nancy and Mark were not married and Nancy was qualifying her consent in that she would retain her parental rights, the court did not have authority to grant the adoption as requested. On November 14, 1988, less than 40 hours prior to the time set for a hearing in the adoption proceedings, Nancy, through her attorney, filed a Motion to Bifurcate the Issues requesting that the court, pursuant to Section 40-8-111(1)(a)(v), MCA

(Appendix, page 44a) terminate Leonard's parental rights; for failure to pay child support during the previous year; separate and apart from the issue of whether to grant the adoption, as requested(Appendix, pages 42a - 52a). Mr. Harrington has answered interrogatories that he did not "intend" to request that Leonard's parental rights be terminated separate and apart from the question of granting the adoption as requested. Mr. Harrington argued that the Motion to Bifurcate the Issues was filed in response to a request by the Department of Family Services for a 30 day extension to complete their adoption investigation.

At the November 19, 1988 hearing, District Judge Thomas C. Honzel, without argument from Leonard's attorney, determined that, because Leonard's consent to the adoption was not necessary, did not mean that Leonard's parental rights would be

terminated. Mr. Harrington disagreed with the court; arguing that Leonard's parental rights could be and should be terminated prior to considering the adoption request (Appendix, at pages 53a - 56a). The District Court limited the hearing to the question of whether Leonard's consent to the adoption was necessary. The court heard testimony from Leonard and Nancy concerning the child support issue. During Leonard's attorney's cross-examination of Nancy, he attempted to question her concerning her reasons(motive, intent) for initiating the adoption proceedings after her divorce from Mark and after Leonard's arrival.
Mr. Harrington objected to that line of questioning. The court sustained the objection, stating that the questioning was getting beyond the support issue(Appendix, at page 64a).

After submission of briefs on the issues of consent and authority to grant the adoption request, the District Court dismissed the adoption because: "There simply is no provision in the Uniform Adoption Act which allows one parent to place a child for adoption with a person who is not a stepparent while retaining his/her parental rights."(Appendix, at page 36a).

Leonard contacted Nancy by telephone to request visitation with Robin. Initially agreeing to a visitation schedule, Nancy, after Leonard informed her that he was requesting sanctions against her attorney, stated; "If that's what you are going to do, you aren't going to see Robin at all." Refusing to schedule visitation, Nancy hung up the telephone.

On March 22, 1989, a hearing was held on the rule 11 sanctions request. (Rule 11, M.R.Civ.P. is nearly identical to the

Federal rule, Appendix, at page 20a.) Leonard had subpoened his attorney and Nancy. The District Court limited the hearing to oral argument. No witness testified. The court determined that sanctions were not appropriate. No findings of fact or conclusions of law were entered. Leonard appealed and the Montana Supreme Court affirmed the District Court decision that rule 11 sanctions were not appropriate (Appendix, page 16a).

Respondents' moved for summary judgement in the malicious prosecution/abuse of process proceedings; arguing that Leonard was barred from raising the issues of malice, improper purpose, and probable cause by the collateral estoppel effect of the rule 11 decision. Leonard argued that a grant of summary judgment based on the doctrine of collateral estoppel would infringe upon constitutional rights. The

District Court granted the motion for summary judgement(Appendix, at page 4a). Raising the issue that his right to due process of law as guaranteed by the 14th Amendment to the Constitution of the United States had been violated, Leonard appealed the District Court's application of the doctrine of collateral estoppel to the Montana Supreme Court(Appendix, at page 3a). On page 32 of Appellant's Brief to the Montana Supreme Court, Leonard cited the specific constitutional provision upon which he based his due process arguments:

> The states are prohibited from denying a person due process of law. Constitution of the United States, 14th Amendment, Section 1.

(For the sake of brevity, not reproduced in the appendix.)

The Montana Supreme Court affirmed the District Court; finding that, because Leonard had had notice and opportunity to be heard, Leonard's constitutional right of due process had not been violated(Appendix, at page 14a).

From this judgment of the Montana Supreme Court, Leonard respectfully requests that this Court grant a writ of certiorari to review the application of the doctrine of collateral estoppel by the Montana courts.

REASONS FOR GRANTING THE WRIT

I. The Montana Supreme Court judgment that Petitioner is barred from litigating factual issues conflicts with the principles announced by this Court and the United States Court of Appeals, Ninth Circuit.

In considering the collateral estoppel effect of administrative board decisions,

the United States Appeals Court for the Ninth District concluded that:

> ...collateral estoppel effect should be given only to those administrative determinations that have been made in a proceeding fully complying with the standards of procedural and substantive due process that attend a valid judgment by a court and further, that such effect should be accorded only to those findings upon material issues that are supported by substantial evidence on the administrative record as a whole.

Paramount Transport Systems v. Chauffeurs, etc. Local 150(9th Circuit 1971), 436 F.2d 1064, at 1066.

It would be wasteful and uninformative for Petitioner to list the many cases from this Court and other circuit courts which support the above cited position as to the requirements which must be met for a prior judgment to have collateral estoppel effect. The critical issue in any application of the doctrine of collateral estoppel is that

the prior proceedings must have fully complied with due process provisions.

As recently as February 6, 1990, the Montana Supreme Court has cited "Paramount" for the principles necessary to support the application of the doctrine of collateral estoppel. Niles v. Carl Weissman & Sons, Inc. (Mont. 1990), 786 P.2d 662.

Although the case was decided on other issues, the court recognized the necessity for opportunity to cross-examine witnesses:

> We leave aside without discussion whether the administrative proceedings in this case complied with judicial standards of substantive and procedural due process. It appears from the record that there were telephonic hearings which may not have afforded Niles the full right of cross-examination.

"Niles" at page 666.

In applying the "Paramount" tests, the Montana Supreme Court held:

> First, the administrative proceedings involved in this case do not comply with the standards of procedural and substantiative

> due process that attend a judicial proceeding, ...

"Niles" at page 666.

The above cited principles are consistent with the principles announced by this Court, the Federal appellate courts, and, for that matter, any court which has considered due process issues in the application of the doctrine of collateral estoppel.

Although the rule 11 proceedings were judicial in nature, the question is the same. Did the proceeding fully comply with procedural and substantive due process requirements? Was the Petitioner allowed to cross-examine the Respondents? Was the Petitioner allowed to call witnesses? Was the Petitioner allowed to testify? Is there substantial evidence supporting the findings of fact?

The answer to all of these questions is; "No!".

The Montana Supreme Court opinion states:

> It is clear that this Court previously decided the issue of whether the petition for adoption was filed for an improper purpose. It was not.

(Appendix A, at page 14a).

The Montana Supreme Court heard no testimony, had no transcript to read, and had no findings of fact from the District Court to read. Somehow, that court found that the Respondent's motives were not improper.

II. This case squarely presents the issue of how far the courts may go in applying the doctrine of collateral estoppel to bar the litigation of disputed issues of fact.

It would be wasteful and uninformative for the Petitioner to list and argue the many cases concerning the meaning of the

term "due process". More importantly is the universally recognized rights which justice demands be afforded even the most vicious and despised of criminals. That is; the right to a full and fair opportunity to defend in open court; the right to question witnesses, the right to testify, the right to call witnesses. A lawyer's education is not required to recognize the injustice in the Montana court's application of this judicial doctrine. It merely requires common sense, common knowledge, and a sense of justice.

III. The judgement of the Montana Supreme Court, if allowed to stand, creates a serious potential for the erosion of the right to due process of law through the misapplication of judicial doctrine.

The Montana Supreme Court has stated that this opinion will not be cited for

precedent. However, if that means that the courts may infringe upon constitutional rights where their decisions will not be cited, then that position has serious implications as to the basic integrity of the judicial system and as to the power of that system to deny an individual fundamental and universally recognized rights.

IV. The finding of the Montana Supreme Court that the Respondents did not act for an improper purpose where based upon no evidentiary record and no findings of fact from the District Court is an arbitrary decision which should not bar the Petitioner from fully presenting his case in the courts.

To allow a court to deny a litigant the right to trial, based upon the outcome of a hearing restricted to oral argument without opportunity to present evidence or

cross-examine opposing parties, and where no findings of fact were entered is inconsistent with the principles of justice which are so highly regarded by the people of this country.

The Montana Supreme Court has accused Leonard of abuse of the legal system. Leonard is denied the right to cross-examine, testify, call witnesses, present evidence, and the right to have clearly disputed facts determined through trial. Common sense, common knowledge, and an ability to read and understand clear and simple language is all that is required to believe that Mr. Harrington and his clients may have abused the most sensitive of legal procedures: ADOPTION. Leonard's allegations of malice and improper purpose are not unfounded in fact. The Montana Supreme Court's approval of the District Court's application of the doctrine of

collateral estoppel where based upon no evidentiary record or findings of fact is an abuse of fundamental legal rights.

CONCLUSION

For the reason that each and every citizen of the United States of America is guaranteed the right to present evidence, question witnesses and cross-examine opposing parties in determining disputed facts; and that the decision of the Montana Supreme Court effectively denies a citizen's fundamental and universally accepted rights in a manner which shocks the conscious; a writ of certiorari should be granted.

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NOTICE OF APPEAL TO THE SUPREME COURT OF THE STATE OF MONTANA FROM THE ORDER OF A DISTRICT COURT
IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

LEONARD F. THOMAS,
Plaintiff, Cause No. XCDV 89-141

vs.

J. CORT HARRINGTON, JR., NOTICE OF APPEAL
MARK A. ERLER,
NANCY J. THOMAS,
Defendants.

Notice is hereby given that Leonard F. Thomas, Plaintiff in the above-named action, hereby appeals to the Supreme Court of the State of Montana from the order granting Defendants' Motion for Summary Judgement entered in this action on the 26th day of July, 1990.

The issues of the above-entitled appeal will be:

1. Did the District Court err in ruling that the issues of Plaintiff's claims for damages are identical to the issues previously decided by the District Court in

ruling on a request that the court impose sanctions for violation of Rule 11, M.R.Civ.P.?

2. Did the District Court err in ruling that the issues of improper purpose, probable cause, and malice have been fully presented in the Courts and those ruling preclude the prosecution of this action?

3. Is the District Court's ruling that the plaintiff is barred from litigating the factual issues in the case at bar, a violation of Plaintiff's right to due process of law as guaranteed by the Constitution of the United States of America?

Dated August 13, 1990.

Leonard F. Thomas

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

LEONARD F. THOMAS,
Plaintiff,

vs.

J. CORT HARRINGTON, JR.,
MARK A. ERLER,
NANCY J. THOMAS,
Defendants.

No. XCDV 89-141

OPINION AND ORDER

This matter comes before the Court on the parties' motions for summary judgment. The motions and supporting briefs were filed and all parties agreed that the same could be submitted to the Court without oral argument. The Court being fully advised in the premises now enters the following:

For the sake of brevity and for the purposes of this ruling, the Court relies on the facts as set forth in In Re the Adoption of R.D.T., 46 St Rep 1489, __M__, 778 P2d 416, (1989). In R.D.T. the Petitioner herein had appealed the lower Court decision refusing to impose sanctions against the same Defendants named in these proceedings. In

R.D.T. the Court affirmed the District Court ruling that the adoption petition filed by these Defendants was done in good faith and not for an improper purpose. Therefore, no sanctions could be imposed against these Defendants under the standards required under Rule 11, M.R.Civ.P.

The Petitioner has filed the instant action for malicious prosecution and abuse of process claiming that the adoption proceedings were not filed in good faith, but rather were filed for a malicious and improper purpose; namely, to wrongfully interfere with Plaintiff's rights of visitation with his daughter. The six elements of a malicious prosecution action have previously been detailed in Vehrs v. Piquette, __Mont__, 684 P2d 476, 479 (1984). The two disputed elements of proof in this case involve the lack of probable cause for Defendant's acts and whether or not

Defendant's acted maliciously. The abuse of process claim is similar to a malicious prosecution action and necessarily involves proof that the action in question was used for an ulterior or improper purpose. Brault v. Smith, 209 Mont 21, 679 P2d 236 (1984), citing Prosser, Law of Torts, 4th Ed. The test to determine if probable cause exists for filing a civil action is whether or not the Plaintiff believes that a jury might find its case meritorious, the subjective test, and secondly, whether or not that belief is reasonable, the objective test. Bradshaw v. State Farm Mutual Auto ins., 758 P2d 1313, (Ariz 1988). The element of malice involves filing an action primarily for a purpose other than that of securing the proper adjudication of the claim upon which the proceedings are based. Restatement of Torts 2nd @674. Defendant's position is that under the

doctrine of collateral estoppel that the specific issues of improper purpose, probable cause and malice have already been fully presented in the Courts and finally ruled upon in favor of the Defendants, and those rulings preclude the prosecution of this action. This Court agrees.

Under the doctrine of collateral estoppel a litigant is barred from relitigation of an issue when the issue is identical to the issue previously decided, final judgment as to that issue previously decided has been rendered, and the party against whom the claim of estoppel is advanced remains the same or is privy of the earlier party. Matter of Unfair Labor Practice No. 38-30, __Mont__, 720 P2d 1181 (1986). Collateral estoppel involves preclusion of issues previously litigated while res judicata precludes claims that have been litigated. Aetna Life and

Casualty Company v. Johnson, 207 Mont 409, 673 P2d 1277 (1984). In the previous case of R.D.T., supra, this same Plaintiff asked that sanctions be imposed against these same Defendants for violation of Rule 11, M.R.Civ.P. Rule 11 requires that ". . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." In deciding a motion for sanctions the Court makes findings guided by its experience in

litigation, its knowledge of the standards of the bar of the Court, and its familiarity with the case before it. Schaworzer, (1985), 104 F.R.D. 181, 195. Based on these guidelines, and after a separate hearing, the trial Court in R.D.T., supra, determine that the adoption petition was filed in good faith and not for the improper purpose of interfering with Petitioner's visitation rights. In other words, the Court found, after reviewing the pleadings and facts of the case, that the Defendants had a good faith or justified belief in the theory of their complaint and that that belief was reasonable in that there was no improper purpose imputed to these Defendants. Therefore, in deciding the motion for sanctions, the previous Court necessarily ruled on the exact issues of good faith and improper purpose which are elements of Plaintiff's claim of malicious prosecution

and abuse of process. These rulings were appealed and affirmed by the Montana Supreme Court. Under these circumstances, all of the elements of collateral estoppel (identity of parties, and issues, and final judgment) have been met and the Plaintiff is precluded from relitigation the issues of good faith and improper purpose which by definition include the elements of malice and probable cause as set forth above. Because these issues have been determined adversely to the Plaintiff, the claims for malicious prosecution and abuse of process must fail.

IT IS THEREFORE ORDERED that the Defendants' motion for summary judgment be and the same is hereby granted for the reasons set forth herein, and the Plaintiff's complaint is ordered dismissed.

LET JUDGMENT BE ENTERED ACCORDINGLY.
DATED THIS 26TH DAY OF JULY, 1990.
District Court Judge Ted L. Mizner

Leonard F. THOMAS, Plaintiff
and Appellant,
v.
J. Cort HARRINGTON, Jr.,
Nancy J. THOMAS,
Mark A. ERLER.
No. 90-409

Supreme Court of Montana.

Submitted on Briefs: December 20, 1990.
Decided: January 15, 1991.
Justice Diane G. Barz delivered the Opinion of the Court.

Leonard Thomas, pro se, brought the above-entitled action in District Court to recover damages for malicious prosecution and abuse of process. On July 26, 1990, the District Court granted summary judgment for the defendants and dismissed the complaint. Plaintiff appeals and we affirm.

The underlying facts and circumstances of this case are set forth In re Adoption of R.D.T. (1989), 239 Mont. 33, 778 P.2d 416. There is also an unpublished, abbreviated opinion of this Court relating to this case where the district court was affirmed.(In re

the Marriage of Erler, No. 90-066, decided July 30, 1990.) This court affirmed the district court in yet another appeal by Thomas in Thomas v. Hale (Mont. 1990), __ P.2d __, 47 St. Rep. 2261.

The dispositive issues on appeal are:

1. Whether the District Court correctly applied the doctrine of collateral estoppel to the facts of this case.

2. Whether Thomas' right to due process of law was violated when the District Court granted summary judgment and dismissed the complaint.

The District Court found that In re Adoption of R.D.T., supra, decided this case on issues of malice, probable cause, and improper purpose, which are essential elements Thomas needed to establish in his claim for malicious prosecution and abuse of process. The District Court applied the doctrine of collateral estoppel and found

that Thomas was precluded from relitigating these issues. Collateral estoppel has three elements: (1) the issue has been decided in a prior adjudication and is identical to the one presented; (2) a final judgment on the merits was issued; and (3) the party against whom the plea is asserted was a party or privy to a party of the prior adjudication. Smith v. Schweigert (1990), 241 Mont. 54, 58, 785 P.2d 195, 197. Thomas does not address in his brief the second and third elements but contends that the issues are not identical in the present complaint. His contention is without merit. The element of malice in the malicious prosecution claim and the element of improper purpose in the abuse of process claim are essentially the same and were addressed in In re Adoption of R.D.T., where this Court held:

> The record and surrounding circumstances in this case provided the District court with an adequate basis to determine if the petition was filed for an improper purpose. The District

> Court found that the petition was not filed for an improper purpose, and based on the record the District Court's findings are not clearly erroneous.

In re Adoption of R.D.T. at 37, 778 P.2d at 419.

It is clear that this Court previously decided the issue of whether the petition for adoption was filed for an improper purpose. It was not. Thomas' claim for malicious prosecution and abuse of process must fail. Furthermore, Thomas' dissatisfaction with the outcome of In re Adoption of R.D.T. is no basis to overturn the summary judgment in this case, nor does Thomas provide a good reason to relieve him from the doctrine of collateral estoppel.

Thomas also claims his due process rights have been violated. Due process requires notice and opportunity to be heard. The issues in this case were raised before the District Court and this Court

previously. In addition this is the sixth proceeding initiated by Thomas. (See Thomas v. Hale (Mont. 1990), __ P.2d __ at __, 47 St. Rep. 2261 at 2263.) It is time to limit Thomas' opportunity to be heard and put an end to his abuse of the judicial system.

Affirmed. Let remittitur issue forthwith.

Pursuant to Section I, Paragraph 3(c), Montana Supreme Court 1988 Internal Operating Rules, this decision shall not be cited as precedent and shall be published by its filing as a public document with the Clerk of this Court and by a report of its result to the West Publishing Company.

TURNAGE, HARRISON, WEBER, HUNT concur.

In re the ADOPTION OF R.D.T., a/k/a R.D.E., a Minor.
No. 89-267

Supreme Court of Montana.

Submitted on briefs July 13, 1989.
Decided Aug. 25, 1989.
Rehearing Denied Sept. 14, 1989.
Leonard F. Thomas, Helena, pro se.
J. Cort Harrington, Jr., Helena, for respondent.
McDONOUGH, Justice.

This appeal involves a claim for sanctions pursuant to Rule 11, M.R.Civ.P. arising out of a petition for adoption. Respondent Leonard F. Thomas appeals from the judgment of the District Court of the First Judicial District, Lewis and Clark County, denying his motion to impose sanctions on petitioners Nancy J. Thomas, Mark A. Erler, and their attorney J. Cort Harrington, Jr. The court ruled that based on the law and the facts as presented at hearing, Rule 11 sanctions were not proper. We affirm.

Respondent Thomas raises only one issue on appeal: Did the District Court err by failing to impose such sanctions?

R.D.T. was born to Nancy J. Thomas and Leonard F. Thomas on October 16, 1978 in Fairbanks, Alaska. The Thomases moved to Montana in 1979. Shortly afterward, Nancy and Leonard separated. That same year, Nancy and R.D.T. began living with Mark A. Erler in Basin, Montana and Leonard returned to Alaska.

Leonard and Nancy dissolved their marriage on February 14, 1983. The decree of dissolution provided that Nancy would have custody of R.D.T. and Leonard would have visitation upon request. No child support was requested. Mark and Nancy were marrried on August 20 of the same year. In February of 1988, the marriage of Mark and Nancy was dissolved. Mark moved into a guest house on the same lot as the family

home where Nancy, R.D.T. and J.E. the daughter of Mark and Nancy, resided.

In August of 1988, Leonard began exercising his visitation rights with R.D.T. Shortly afterward, Nancy and Mark, now divorced, filed a joint petition for the adoption of R.D.T. by Mark. The proceeding was bifurcated into two issues. The first issue was whether Leonard's parental rights should be terminated for non-support of R.D.T. The second issue involved a determination of whether the adoption by Mark A. Erler was in R.D.T.'s best interests. A hearing on the first issue was held on November 16, 1988 in the District Court of the Fifth Judicial District. The court took under advisement Leonard's motion to dismiss for lack of jurisdiction and limited the hearing to the question of whether Leonard's consent was required to complete the adoption. After submissions of

additional briefs on the jurisdictional question, the court granted Leonard's motion to dismiss the petition.

On January 16, 1989, Leonard filed a motion to impose sanctions on the petitioners Mark and Nancy and their attorney J. Cort Harrington for violation of Rule 11 of the Montana Rules of Civil Procedure. Leonard's motion alleged that a reasonable inquiry into the adoption statutes by a competent attorney would have resulted in the conclusion that the petition for adoption was not warranted by existing law and that the petition was filed for an improper purpose. Leonard's motion was denied after a hearing and the propriety of that denial is now before this Court on appeal.

Rule 11, M.R.Civ.P., which is nearly identical to the federal rule, provides that:

> ... Every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record.... The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Rule 11, M.R.Civ.P. The Rule further provides for the imposition of sanctions on any party, the party's attorney, or both if a pleading is signed in violation of the Rule. Rule 11, M.R.Civ.P. Appellant Leonard first contends that a reasonable inquiry into the adoption statute by the petitioners' attorney, Mr. Harrington, would have indicated that the petition was not warranted by existing law. The applicable

statute is § 40-8-109(1), MCA, which provides as follows:

> 40-8-109 Placement for adoption by parents. (1) No parent may make a placement of a child for adoption with an individual who is not a stepparent or a member of the child's extended family unless the parent files with the district court for the county in which the prospective adoptive parent or the parent making the placement resides:
>
> (a) a notice of parental placement; and
>
> (b) a relinquishment of parental rights to the prospective adoptive parents executed voluntarily and in accordance with 40-6-135(2) through (4).

As correctly noted in the District Court's Memorandum and Order granting Leonard's motion to dismiss the petition, Mark is neither the stepparent nor a member of R.D.T.'s extended family. Furthermore, Nancy did not relinquish her parental rights; rather, she specifically stated in the petition that she would retain her parental rights. The court dismissed the

petition because the requirements of *40-8-109, MCA, were not met.

[1] Appellant argues that a reasonable inquiry into the meaning of *40-8-109, MCA, by Mr. Harrington would have led to the conclusion that the adoption was not warranted by existing law, as evidenced by the ruling of the District Court on the motion to dismiss. However, to avoid sanctions under Rule 11 it is not necessary that a party be correct in their view of the law. The party need only make a good faith argument for their view of the law. Zaldivar v. City of Los Angeles (9th Cir. 1986) 780 F.2d 823, 830-831. Thus the granting of a motion to dismiss against the pleader is not dispositive of the issue of sanctions. Zaldivar, 780 F.2d at 830.

[2] The petitioners' attorney, Mr. Harrington argued that * 40-8-109, MCA, did not apply because there had been no

"placement for adoption." "Placement for adoption" is defined as "the transfer of physical custody of a child with respect to whom all parental rights have been terminated and who is otherwise legally free for adoption to a person who intends to adopt the child." Section 40-8-103(10), MCA. Petitioners argued that because there was no intent to transfer physical custody of the child and there was no attempt to terminate the parent/child relationship between Nancy and R.D.T. the petition did not constitute a "placement for adoption." While the District Court did not agree with this argument, it held that the argument was made in good faith.

[3] We agree. In judging the good faith argument the court must strive to avoid the wisdom of hindsight in determining whether a

pleading was valid when signed, and any and all doubts must be resolved in favor of the signer. Eastway Construction Co. v. City of New York (2nd Cir. 1985), 762 F.2d 243, 254.

Leonard also relies on * 40-8-125, MCA, to support his argument that the petition was not based upon a reasonable inquiry into the adoption statutes. The statute provides that the effect of a final decree of adoption is to terminate the rights of the natural parents, unless they are the adoptive parents or a spouse of an adoptive parent, and to vest those rights in the adoptive parents. If the District Court had proceeded with the petition and terminated Leonard's parental rights pursuant to the first portion of the bifurcated hearing, a final decree of adoption entered after the second portion would only have affected the parent/child relationship between Nancy and

her daughter R.D.T. Thus, the appellant has no standing to raise the issue of the effect of *40-8-125, MCA.

[4] Finally, Leonard contends that the petition for adoption was filed for an improper purpose, to delay and prevent visitation between Leonard and his daughter R.D.T. The petitioners contend that the purpose of the petition was to officially establish the parent/child relationship between Mark and R.D.T., a relationship petitioners argue had existed in fact for nine years. As noted in Schwarzer, Sanctions Under the New Federal Rule 11 (1985), 104 F.R.D. 181, when determining whether a pleading was filed for an improper purpose, the court, in its discretion, should objectively consider all the facts and circumstances in the case:

> In considering whether a paper was interposed for an improper purpose, the court need not delve into the attorney's subjective intent. The record

> in the case and all of the surrounding circumstances should afford an adequate basis for determining whether particular papers or proceedings caused delay that was unnecessary, whether they caused increase in the cost of litigation that was needless, or whether they lacked any apparent legitimate purpose. Findings on these points would suffice to support an inference of an improper purpose. The court can make such findings guided by its experience in litigation, its knowledge of the standards of the bar of the court, and its familiarity with the case before it.

Schwarzer (1985), 104 F.R.D. 181, 195. The record and surrounding circumstances in this case provided the District Court with an adequate basis to determine if the petition was filed for an improper purpose. The District Court found that the petition was not filed for an improper purpose, and based on the record the District Court's findings are not clearly erroneous.

The imposition of sanctions pursuant to Rule 11 lies within the discretion of the district Court. Schmidt v. Colonial Terrace Assoc. (1986) 223 Mont 8, 723 P.2d 954. We find no abuse of discretion in this case.

We affirm the District Court. HARRISON, SHEEHY, WEBER and GULBRANDSON, JJ., concur.

MONTANA FIRST JUDICIAL DISTRICT COURT,

LEWIS AND CLARK COUNTY

IN THE MATTER OF THE ADOPTION OF

ROBIN DIANA THOMAS,

A MINOR,

Cause No. CDA 88-39

MEMORANDUM AND ORDER

Before the Court is the petition of Mark Anthony Erler and Nancy Jeanne Thomas to terminate the parental rights of Leonard Farrell ("Abe") Thomas to Robin Diana Thomas

and to establish the relationship of parent and child between Mark Anthony Erler and Robin Diana Thomas. Leonard Thomas, the natural father of Robin Diana Thomas, objects to the adoption and has moved to dismiss the petition on the grounds that the Court does not have jurisdiction and on the further grounds that his consent is required before the adoption could be granted.

A hearing was held on November 16, 1988. Mark Anthony Erler and Nancy Jeanne Thomas were present and were represented by Cort Harrington. Leonard Thomas was present and was represented by Dennis Loveless. The Court limited the hearing to the question of the father's consent. In addition, the Court took under advisement Mr. Thomas' motion to dismiss for lack of jurisdiction. At the conclusion of the hearing, the Court ordered both parties to file briefs regarding the jurisdictional

question and whether Mr. Thomas, consent is required. The briefs have now been filed and the matter is ready for decision.

FACTUAL BACKGROUND

Nancy Thomas and Leonard Thomas were married on January 21, 1978 in Fairbanks, Alaska. Robin Diana Thomas was born as the issue of that marriage on October 16, 1978.

In the fall of 1979, Nancy and Abe separated and Nancy moved to Montana with Robin. After moving to Montana, Nancy and Robin began living with Mark Anthony Erler. That living arrangement continued until February 1988.

In 1982, Nancy and Leonard signed a joint petition for dissolution of their marriage. Neither Nancy nor Leonard was represented in the dissolution proceeding. The papers were apparently prepared by Nancy who sent them to Leonard in Alaska to be signed. According to the verification,

Leonard signed the Petition on June 22, 1982 and Nancy signed on July 9, 1982. For whatever reason, the petition was not filed with the Court until February 14, 1983. On that same date, Judge Davis entered a decree of dissolution.

Paragraph 5 of the petition for dissolution reads: "There have (sic) been one child born of the marriage of the parties, name of Robin D. Thomas, age 3 years. Custody to mother, visitation allowed upon request, no child support requested."

Paragraph 4 of the findings of fact entered by Judge Davis reads: "That there is one minor child the issue of said marriage. Custody to mother, no child support requested, visitation allowed upon request." The decree states only that the marriage is dissolved.

On August 20, 1983, Nancy and Mark were married. One child was born of that marriage, Jessica Jeanne Mia Erler, now age four. In February 1988, Nancy and Mark were divorced. At that time, Mark moved into the guest house on the same half acre of lot as the family home in which Nancy, Robin, and Jessica continue to reside. Mark maintains regular and frequent contact with the children.

After his separation from Nancy, Leonard had no contact with Robin and maintained only infrequent contact with Nancy. Prior to the summer of 1988, Nancy had not seen Leonard for eight years. She would write to him about once a year and he would respond about once a year. Leonard did not write any letters to Robin nor did he telephone. With one exception, he did not send her gifts on Christmas or her birthday.

Following the separation, Leonard did not pay any child support until September 1988. During that period of time, Leonard was capable of working.

After her divorce from Mark, Nancy applied for and began receiving AFDC for Robin.

In August 1988, Leonard contacted Nancy in Helena and initiated visitation with Robin. Around Labor Day, he gave Nancy $60 so that she could buy school supplies for Robin. In September 1988, Leonard contacted the Child Support Enforcement Bureau of the Montana Department of Revenue to establish the amount of child support he should be paying. Based on his financial statement, the Child Support Enforcement Bureau set the amount of child support at $50 per month. At about the same time, Leonard made a $400 payment to the Department for child support retroactive to March 1988.

On September 30, 1988, this petition for adoption was filed.

DISCUSSION

Section 40-8-104, MCA, provides that a minor whose parents are living may be adopted if the parental rights of the living parents have been terminated or if the living parents consent to the adoption. In this case, the parental rights of the parents have not been terminated. Although the mother has not filed a written consent to the adoption as such, she has joined in the petition which seeks to have the child adopted by Mark Erler but on the condition that she retain her parental rights.

The father of the child does not consent to the adoption. Petitioners contend that because he did not contribute to the support of the child for over a year prior to the filing of the petition, his

consent is not required as provided in Section 40-8-111(1)(a)(v), MCA.

The father contends that because Mark Erler and Nancy Thomas are not married, the Court cannot grant the petition unless the requirements of Section 40-8-109, MCA, are met. Since those requirements have not been complied with, he argues that the Court does not have jurisdiction and that the petition must be dismissed. He further contends that even if the Court does have jurisdiction, his consent is required under the facts of this case.

Section 40-8-108, MCA, provides that a child may be placed for adoption only by the Department of Family Services, a licensed adoption agency, or the child's parents. Section 40-8-109(1), MCA, states:

> (1) No parent may make a placement of a child for adoption with an individual who is not a stepparent or a member of the child's extended family unless the parent files with the district court for the county in which the

> prospective adoptive parent or the parent making the placement resides:
>
> (a) a notice of parental placement; and
>
> (b) a relinquishment of parental rights to the prospective adoptive parents executed voluntarily and in accordance with 40-6-135(2) through (4). (Emphasis supplied)

Mark Erler is neither a stepparent nor is he a member of the child's extended family as defined in Section 40-8-103(8), MCA. Furthermore, Nancy Thomas has not relinquished her parental rights. Rather, she has specifically stated in the petition that she will retain her parental rights. Therefore, the requirements of Section 40-8-109, MCA, have not been met.

Petitioner argues that Section 40-8-109, MCA, does not apply. The language of the statute is, however, quite clear. When a parent places a child for adoption, the parent must comply with its requirement. The only exception is if the individual who will be adopting is a stepparent or a member

of the child's extended family. There simply is no provision in the Uniform Adoption Act which allows one parent to place a child for adoption with a person who is not a stepparent while retaining his/her parental rights.

Based on the foregoing, the Court concludes that because the requirements of Section 40-8-109, MCA, have not been met, it does not have authority to grant the petition and that Respondent's motion to dismiss should be granted.

NOW, THEREFORE, IT IS ORDERED that Respondent's motion to dismiss is hereby GRANTED.

DATED this 5th day of January, 1989.

DISTRICT JUDGE Thomas C. Honzel

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

IN RE THE ADOPTION OF:
ROBIN DIANA THOMAS, a/k/a
ROBIN DIANA ERLER,
A Minor Child.

Cause No. CDA 88-39
PETITION FOR ADOPTION

COMES NOW the Petitioners, Mark Anthony Erler and Nancy Jeanne Thomas, and allege as follows:

1. The Petitioner, Nancy Jeanne Thomas, hereinafter "Nancy", is 34 years old and resides at 3474 Rimini Road.

2. The Petitioner, Mark Anthony Erler, hereinafter "Mark", is 32 years old and resides at 3474 Rimini Road.

3. Robin was born on October 16, 1978 in Fairbanks, Alaska to Nancy and Leonard Farrell, also known as "Abe Thomas", hereinafter "Abe".

4. Nancy and Abe lived together from the time of Robin's birth in 1978 until the fall of 1979, when the parties separated.

5. Between the parties' separation in the fall of 1979 and August, 1988, Robin and Abe have had no contact. Abe has not written Robin; he has never called Robin; he has never sent Robin a birthday or Christmas present; and he has failed to provide any support for Robin.

6. Between 1979 and 1988, Abe was in infrequent contact with Nancy. From that infrequent contact, it is known that Abe was working and could have, if he chose, supported Robin. During these infrequent contacts, Nancy kept Abe informed of Robin's whereabouts and her general welfare.

7. In 1979, approximately two months after Nancy and Abe separated, Nancy and Robin began living with the Petitioner, Mark. Robin has lived with Mark since 1979 and Mark is the only father Robin has ever known.

8. Robin is currently in the fourth grade at Kessler School and has always been known in school as "Robin Erler".

9. Although Mark and Nancy began living together in 1979, were not married until August 20, 1983. On February 19, 1988, their marriage was dissolved.

10. Although the marriage of Mark and Nancy was dissolved, they both continue to live on the half acre lot located at 3474 Rimini Road in Helena, Montana and there is still a family unit composed of Mark, Nancy, Robin, and Jessica Jeanne Mia Erler, hereinafter "Jess", the natural child of Mark and Nancy.

11. In August of 1988, Abe appeared on the scene and has caused disruption of the family unit composed of Mark, Nancy, Robin, and Jess.

12. Nancy, Mark and Robin currently view Mark as Robin's father and they desire to

legally establish the relationship of parent and child between Mark and Robin.

13. Abe's consent to this adoption is not required because he has not supported Robin for the past nine years, although he was able.

14. Robin has no property, other than the items of personal property such as her clothing. Any property she does own has only a nominal value.

WHEREFORE, the Petitioners seek:

1. To terminate the parental rights of Leonard Farrell("Abe") Thomas to Robin Diana Thomas.

2. To establish the relationship of parent and child between Mark Anthony Erler and Robin Diana Thomas.

3. To change Robin's name from Robin Diana Thomas to Robin Diana Erler.

4. To waive the entry of the interlocatory decree and the waiting period of six months and grant the final decree of adoption.

5. For such other and further relief as the court deems just and proper.

Dated this 28th day of September, 1988.

J. CORT HARRINGTON, JR.

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

IN RE THE ADOPTION OF:
ROBIN DIANA THOMAS, a/k/a
ROBIN DIANA ERLER,
a Minor Child.

Cause No. CDA 88-39

MOTION TO BIFURCATE THE ISSUES

COMES NOW the Petitioner, Nancy Thomas and respectively moves the court to hold a separate hearing on the following issues:

1. Should the parental rights of Leonard F. Thomas to Robin Diana Thomas be terminated, pursuant to Section 40-8-111(1)(a)(v), MCA and

2. If the court determines that the parental rights of Leonard F. Thomas should be terminated, should the court grant the Petition to create the relationship of parent and child between Mark Erler and Robin Diana Thomas.

This motion for bifurcation is supported by the attached memorandum.

DATED this 14th day of November, 1988.

J.CORT HARRINGTON, JR.

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

IN RE THE ADOPTION OF:
ROBIN DIANA THOMAS, a/k/a
ROBIN DIANA ERLER,
a Minor Child.

Cause No. CDA 88-39

MEMORANDUM IN SUPPORT OF MOTION FOR BIFURCATION OF ISSUES

INTRODUCTION

On September 30, 1988, a Petition was filed seeking basically two things:

1. The termination of the parental rights of Leonard F. Thomas to Robin Diana Thomas; and

2. Create the relationship of parent and child between Robin Diana Thomas and Mark Erler.

A hearing is scheduled for November 16 on the petition.

In a letter dated November 4, 1988, the Department of Family Services has chosen to investigate this adoption and request a 30 day extension in which to file a report.

The petitioner offers no objection to the court granting the extension. However, Petitioner believes that the November 16 hearing could still be utilized to address the issue of the termination of the parental rights of Leonard F. Thomas.

It is the petitioner's understanding that Leonard F. Thomas does not consent to this adoption and if the court determines that his consent is necessary, then it may not be necessary for the Department of Family Service to conduct the investigation.

The issue of whether the parental rights of Leonard F. Thomas should be terminated is separate and apart from the issue of whether to grant the adoption.

The issue of whether Leonard F. Thomas' parental rights should be terminated is controlled by Section 40-8-111(1)(a)(v), MCA which provides:

> 1. An adoption of a child may be decreed when there have been filed written consents to adoption executed by:
>
> a. both parents, if living or the surviving parent of a child, provided that consent is not required from a father or mother:
>
> ...
>
> (v) If it is proven to the satisfaction of the court that the father or mother, if able, has not contributed to the support of the child during a period of 1 year prior to the filing of a petition for adoption;

That statute sets forth a two part test to determine whether the consent of a parent is necessary. First, the court must determine whether the non-consenting parent has contributed to the support of the child during a period of 1 year prior to the petition. Second, the court must determine whether the non-consenting parent had the ability to contribute to the child's support. In the Matter of the Adoption of SLR, 196 Mont 411, 640 P.2d 886, 39 St.Rep. 156(1982). In the Matter of the Adoption of RAS, 202 Mont. 438, 679 P.2d 220, 41 St.Rep. 451 (1984).

Separating the issues of termination of parental rights from the issue of whether to grant the adoption is consistent with the policy underlying the Uniform Adoption Act(Title 40, Chapter 8, Part 1, MCA). The Commission's comments to Section 40-8-111, MCA provides that controversies in the

termination of a parental right should be settled before proceeding to the adoption. For example, in Burns v. Burns, 198 Mont. 365, 646 P.2d 530, 39 St.Rep. 1059(1982), a petition to terminate the parental rights of the natural father was brought prior to the filing of the petition for adoption. The petition to terminate the parental rights was brought under Section 40-8-111(1)(a)(v), MCA. Although the District Court found that the natural father was able to support his child, and he failed to provide that support, it did not terminate his parental rights. On appeal, the Montana Supreme Court reversed the District Court and terminated the natural father's parental rights. The Supreme Court pointed out that the natural father's legal right to prevent an adoption is inconsistent with his voluntary failure to contribute to the support of the child. The statute requiring

consent should not be interpreted in favor of a father who seeks the benefit of his parental rights, but who shunes the burden of those same parental obligations. 646 P.2d at 532. Similarly, in the matter of Adoption of CFB, Jr., 208 Mont. 507, 679 P.2d 777, 41 St.Rep. 498(1984), a petition to terminate a natural father's parental rights was filed separate from the petition to adopt. In that case, the District Court found that the natural father was able to pay child support but failed to do so during the period of the three years and nine months prior to the filing of the petition for adoption and his consent to the adoption was therefore not required. Hence, the District Court ordered the natural father's parental rights terminated. The natural father appealed to the Montana Supreme Court, but that appeal was affirmed. At the time of affirming the termination of the natural

father's parental rights, the adoption itself had not yet been granted.

It is clear, from the two cases cited above, that the question of whether to terminate the parental rights of Leonard F. Thomas can be and should be separated from the hearing on whether to grant the adoption as requested in the petition.

As stated above, Section 40-8-111(1)(a)(v), MCA sets forth a two part test to determine whether to terminate the natural father's parental rights. Under the first part of that test, the court must determine whether Leonard F. Thomas contributed to the support of the child during the period of 1 year before the filing of the petition for adoption. The term "during a period of 1 year", is construed in the case of In the matter of Adoption of RAS, 202 Mont. 438, 679 P.2d

220, 41 St.Rep. 451 (1984). The Supreme Court states:

> [T]he legislature is presumed to have understood the elementary rules of construction of the English language, and the statute must be construed according to the context and approved usage of the language. Black's Law Dictionary, 5th Ed., p. 453, defines "during as: "throughout the course of, throughout the continuance; in the time of". 41 St.Rep. at 454

This language is brought to the court's attention because petitioner believes that Leonard F. Thomas will contend that by making a $50 payment to the State of Montana, to reimburse the state for AFDC payments made to the petitioner, he has "contributed to the support of the child during a period of 1 year before the filing of a petition for adoption". A similar argument was made in Adoption of RAS, supra. In that case the natural father made a single support payment of $450 on December 20, 1981. The petition to adopt was filed on

December 2, 1982. The natural father argued that a payment was made "during the 1 year period before the filing" and that the statute must be strictly construed in favor of the natural father. The Montana Supreme Court rejected that argument and stated that the single payment was not "support of the child during" the 1 year period before the filing of the petition to adopt. The natural father's argument would allow a parent to avoid the consequences of the statute if he made a single support payment each year. "Support" in the context of the consent statute refers to the "financial support that a parent owes a child". 41 St.Rep. at 454.

With respect to the second part of the two part test, petitioner must show that the natural father had the ability to contribute to the support of the child. In this instance, Leonard F. Thomas has chosen a lifestyle which may not have provided him

with sufficient income to make the actual support payments. It should also be pointed out, however, that he suffers no physical or mental impairment and he possesses the skills which would have made him employable. His voluntary choice of a lifestyle is inconsistent with his parental support obligations. Although it is conceded that he had a right to choose such a lifestyle, choosing that lifestyle is not consistent with his obligation to support his child. In the matter of Adoption of SLR, 196 Mont. 411, 640 P.2d 886, 39 St.Rep. 156(1982).

CONCLUSION

The court should separate the issues of whether to terminate the parental rights of Leonard F. Thomas from the issue of whether to grant the adoption.

If the court separates the two issues, the court should terminate the parental rights of Leonard F. Thomas because, although he was able, he failed to support Robin Diana Thomas during the past year.

Respectfully submitted this 14th day of November, 1988.

J. CORT HARRINGTON, JR.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK
IN THE MATTER OF:
THE ADOPTION OF ROBIN DIANA THOMAS,
a Minor.
Cause No. CDA 88-039

PARTIAL TRANSCRIPT OF PROCEEDINGS

Heard at the Lewis & Clark County Courthouse
Department #3
Helena, Montana
November 16, 1988
9:00 a.m.

HEARD BEFORE THE HONORABLE THOMAS C. HONZEL

APPEARANCES

MR. J. CORT HARRINGTON
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Helena, MT 59624
FOR THE PETITIONER

MR. DENNIS G. LOVELESS
Attorney at Law
Post Office Box 225
Helena, MT 59624
FOR THE RESPONDENT

CATHERINE R. JOHNSON,
Registered Professional Reporter
(Whereupon, the following is a partial excerpt of the proceedings that were had:)

THE COURT: But now, his parental rights -- I maybe wrong about this -- it gets confusing, I guess, as you read the statute but the statute says that his consent is not required in certain instances. Assuming that those apply that doesn't mean that his parental rights are terminated.

MR. HARRINGTON: Well, I would disagree with Your Honor on that piont. I think that -- I cited in my brief at least two cases in which there was a petition to terminate the parental rights of a non-supporting parent; and that was filed sort of contemporaneous with the petition to adopt but at a separate time; and in both of those instances the Montana Supreme Court said his consent wasn't required; therefore, his parental rights are terminated; and I think that the

Court, in construing that statute, the fact that those two cases were brought under that statute to terminate the parental rights and the fact that the Supreme Court jumped that gap and said okay, his consent is not required; therfore his parental rights are terminated; and in both of those cases, the question of whether the petition to grant the adoption had not yet been addressed by the Supreme Court, it was merely the issue of whether the father's consent was --

THE COURT: It wasn't addressed because the District Court determined that the consent was required.

MR. HARRINGTON: Well, no in some instances, they determined that the consent wasn't required; and that their order was appealed. In the other instance the father was -- it was determined that consent was required but -- and he appealed but in both cases the Court did not go the next step and

address whether it was in the best interests to grant the adoption.

THE COURT: Well, I don't remember what the name of it is but about a year ago there was this case out of Missoula County were the District Court determined that the consent wasn't required but didn't grant the adoption anyway; and in that instance the Supreme Court affirmed it; and in that instance the paternal rights were not terminated.

The father was allowed to have continual contact with the child. That's the most recent case.

MR. HARRINGTON: I'm not --

THE COURT: I think what I am going to do, we will hear the testimony. I don't think I am in a position to determine whether there is standing here or how far my jurisdiction can go.

I think we will hear the testimony as to whether the consent is required; and I am going to want more briefs on this question of standing. I am not sure in that case, that Missoula County case, whether they really did address the question of what happens to the parental rights when we determine that consent isn't required but in that case the District Court did not grant the adoption based on the best interests of the child; and the best interests of the child had to do with the fact that the father ought to have contact with the child dispite the fact that they haven't paid support.

Then, the only conclusion I can draw from that is that his parental rights are not terminated. If they were terminated he would no longer be able to have contact with the child regardless of whether the adoption went through, so --

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

LEONARD F. THOMAS,
Petitioner,

vs.

NANCY J. THOMAS,
Respondent.

Cause No. CDA 88-039

PARTIAL TRANSCRIPT OF PROCEEDINGS

Heard at the Lewis and Clark County Courthouse
Department #3
Helena, Montana
November 16, 1988
9:00 a.m.

HEARD BEFORE THE HONORABLE THOMAS C. HONZEL

APPEARANCES

Mr. J. Cort Harrington, Jr.
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ON BEHALF OF
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Mr. Dennis G. Loveless
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Helena, MT 59624
ON BEHALF OF
THE PETITIONER

CATHERINE R. COLE-JOHNSON,
Registered Professional Reporter

CROSS EXAMINATION

By Mr. Loveless:

Q The divorce decree did not list any amount of child support; is that right?

MR. HARRINGTON: Your Honor, I would object to that, I think the divorce decree speaks for itself.

THE COURT: Well, it does. I am curious about that, though, so I am going to let her answer.

A (By The Witness[Nancy J. Thomas]) Well, my understanding was that by him not paying child support he was leaving me free and Robin free to live our own lives; and that he would step out of the picture and allow us to make our own way and not be involved. When I entered that I thought we had an agreement that that was the situation.

Q So, you made that request, that he not pay you any child support?

A Yes because I knew his financial situation. Half the time he doesn't have any money. I didn't want someone constantly hounding him for money that he didn't have. I thought that was a nice thing to do. Also, I was under the understanding that by doing this, I was solely responsible for my

daughter; and he would pretty much leave us to live our own lives and go on about it and not suddenly show up and cause strife in our family situation, which is what has happened. It's caused a rift between the sisters. It's caused Robin a lot of stress.

She is very uncomfortable, sad, and confused. She is quite unhappy since all of this began.

Q And in order to stop him from visiting then that's why you filed the petition for adoption?

A No, I was letting him visit. I welcomed him into my home and told him it was -- I had prepared Robin for his visit; and everything was fine.

About two days after he arrived he started having these temper tantrums and accusing me of all these bizzare things; and telling me that he was going to be Robin's father no matter what. It didn't matter

what Robin wanted. It didn't matter what I wanted. He was going to be Robin's father and Mark was going to be out of the picture; that he was going to take sole responsibility; and basically I felt extremely threatened; and the visitation I had been allowing him wasn't enough; and he kept demanding more and more time. I felt he was a stranger to her. Robin didn't know him. I didn't know him. I haven't seen him in eight years. I only knew him for two years.

All of a sudden, he is wanting to take my child off every weekend out of town to Lincoln. I don't know this person any more; and my daughter wasn't comfortable with the idea of being gone for any length of time; and I just felt like he was moving much too quickly; and so at that point when he was constantly harrasing me about more and more visitation; and he kept constantly

threatening me to take me to Court if I don't give him the visitation I want, I felt this was wrong because like I say, he was returning Robin and making her feel very upset; and I was very uncomfortable with the situation; and I don't understand why he couldn't have worked into the situation slowly as we had set up.

He was seeing her one day every week. I was willing to give up one of my weekends so that he could visit with her all day on Saturday but he just -- he got very angry and was constantly making these horrible scenes.

So, on the second night that he had a temper tantrum, I told him he wasn't welcomed to stay in my house; if he wanted to live with Robin he was going to live elsewhere. I didn't want myself exposed to all the negativity and all this name-calling and things that were just so strange that I

couldn't understand. I couldn't understand that -- I felt that he had lost the idea that it's Robin's best interests is what we are looking at; and I felt that he had completely lost that.

He was moving on selfish motivation as opposed to what was best for my daughter.

Q And, so you wanted to terminate his rights by trying to go through an adoption?

A I wanted to -- I want to make my daughter happy is what I want to do. I want her to keep the stabilization and the security that she has had up until this point when all of this broke loose. She was very comfortable. she was dealing with our divorce just wonderfully.

I live on the same property as my husband in the guest house. Everything was very fine; and not a lot of differences have come up between Mark and I. We have gotten

along better now since the divorce. We have become very good friends.

Now, the girls see this; and they see that just because we're not living together doesn't mean we hate each other. It's a good positive environment; and we had discussed divorce shortly after the divorce -- I mean the adoption after the divorce because we felt Robin was kind of the odd man out. Jess was going by Erler.

I thought Robin wanted to keep her name Erler; and she definitely feels that Mark is her father; and she wants to stay in that family unit; and so we thought that adoption would just secure her position of getting her where she wanted to be, which was stabilized in this family unit.

Even if we're divorced, I feel we have a very strong family unit. That may sound unusual but it's true.

Q You live on the same property and you are trying to sell that property, though; is that correct?

A We have been trying to sell it, although we have discussed the fact that we're both very comfortable where we are at and maybe we should take it off the market and let things as they are. It's really good for the children to go from house to house. There is no major separation between them and I or them and their father.

Q But the fact is you never attempted to initiate any adoption procedures until after Leonard Thomas came on the scene?

A No.

MR. HARRINGTON: Your Honor, I'm going to have to start objecting to this line of questioning.

THE COURT: We are getting beyond the support issue.

Q (By Mr. Loveless) All right. You stated you did maintain contact with Mr. Thomas throughout the time since the divorce up until the present?

A After the divorce I wrote him once.

Q Your divorce with Mr. Thomas?

A Oh, yes, about once a year or so, I would send a card or a letter.

Q And so you knew what his address was?

A Yes, most of the time I did.

Q Do you know what his income has been?

A No, I never personally asked him what his income was because I knew it usually fluctuated, like I say from the last letter I received he was telling me that he was making more money than he had in years in an easy job where he was basically on a clean-up committee; and that it was the best job he had because he was making so much money. I thought he said something like $17.00 an hour. That just comes to mind.

Q Where was he living during that time?

A He's in Alaska. I believe he was in Delta Junction. See, I can't even remember -- Delta Junction or I think it was Delta Junction is where he was at.

Q Have you ever applied for A.F.D.C.?

MR. HARRINGTON: Your Honor, I would object to this line of questioning as irrelevant.

THE COURT: No, it's relevant from her standpoint, it seems to me. You can answer that.

A (By The Witness) Yes. After the divorce, I found myself quite short on money; and it's very difficult to -- everything costs a lot of money; and I have a job; and I work very hard at it; and yet still there are bills for the children who constantly need clothing. They constantly need a lot of things; and just keeping a warm roof on over their heads, a good, solid

place, stable home environment costs money that I didn't have enough of to make the bills meet.

Q After your divorce?

A After my divorce with Mark, also after my divorce with Leonard.

Q So, you have applied on at least two occasions?

A Yes, the first time I was on it for about six months, then I found a fulltime job. I felt Robin was doing well enough that I could get a good fulltime job. I was on it because I didn't feel she was ready for me to leave her at that point and get a fulltime job somewhere.

I went on A.F.D.C. in times when I found myself in dire financial straits and not being able to go back to school or anything to provide better for my children at that point.

Q Do you remember when you applied that you had to fill out certain applications?

A Oh, there was about a million pieces of paper, yes, I remember all the paperwork.

Q And do you remember whether or not you had to supply the address of the natural father of Robin?

A Yes; and I said I wasn't sure where he was at because I hadn't heard from him, I think it was the previous March. It had been a year; and like I say, he moves around a lot. I hadn't written to him. I wasn't sure of his location; and so I put down that I hadn't seen him; and I didn't know exactly where he was.

Q Did you put down any address or location at all for --

A I don't think so, no because I wasn't sure where he was.

Q But you had been corresponding with him?

A Off and on, yes but like I say, that address changed frequently. It had been approximately a year since I had written or received anything; and I wasn't -- I don't remember -- I didn't have an address or I probably would have written it down.

Q Could you have placed Basin, Montana?

A I knew he wasn't in Basin, Montana. I knew he was in Alaska. I should have maybe just wrote down Alaska on there. I didn't have no idea - I knew he wasn't living in Basin, Montana but that was years ago. He was only there for a few months.

MR. LOVELESS: I have no other questions.

Section 45-5-631, MCA,

(1) A person who has legal custody of a minor child commits the offense of visitation interference if he knowingly or purposely prevents, obstructs, and frustrates the visitation rights of a person entitled to visitation under an existing court order.